



# Why Cross Boundaries?

## Citation

Mary Ann Glendon, Why Cross Boundaries?, 53 Wash. & Lee L. Rev. 971 (1996).

## Published Version

<http://scholarlycommons.law.wlu.edu/wlulr/vol53/iss3/6/>

## Permanent link

<http://nrs.harvard.edu/urn-3:HUL.InstRepos:12991690>

## Terms of Use

This article was downloaded from Harvard University's DASH repository, and is made available under the terms and conditions applicable to Other Posted Material, as set forth at <http://nrs.harvard.edu/urn-3:HUL.InstRepos:dash.current.terms-of-use#LAA>

# Share Your Story

The Harvard community has made this article openly available.  
Please share how this access benefits you. [Submit a story](#).

[Accessibility](#)

6-1-1996

## Why Cross Boundaries?

Mary Ann Glendon

Follow this and additional works at: <http://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Legal Writing and Research Commons](#)

---

### Recommended Citation

Mary Ann Glendon, *Why Cross Boundaries?*, 53 Wash. & Lee L. Rev. 971 (1996),  
<http://scholarlycommons.law.wlu.edu/wlulr/vol53/iss3/6>

This Article is brought to you for free and open access by the Law School Journals at Washington & Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized administrator of Washington & Lee University School of Law Scholarly Commons. For more information, please contact [osbornecl@wlu.edu](mailto:osbornecl@wlu.edu).

# Why Cross Boundaries?

Mary Ann Glendon\*

What made the invitation to participate in the *Writing Across the Margins* symposium irresistible was not only the prospect of swapping tales with fellow trespassers, but also the spirit of risk-taking that seems to have animated the conference plan. Even the word "margins," which ordinarily would connote more or less fixed bounds, becomes elastic in the lexicon of Lash LaRue. "Come to Lexington," he said, "and talk about rhetoric or authority in constitutional law; or about the difficulties or rewards of cross-disciplinary or cross-national research; or any or all of the above."

That was an offer I could not refuse. I will confine myself to just one aspect of the topic: the question of why anyone engages in interdisciplinary or comparative legal studies given the formidable practical difficulties and the high risk of error or failure.

I will be brief about the difficulties, for they are fairly obvious. The major problem is that if cross-disciplinarians waited to know as much as we feel we ought before writing, we could never put pen to paper. The same may be said, of course, of any researcher in the natural or human sciences because the horizon of human knowledge recedes as the mind approaches it. But the risks of error, oversight, and misunderstanding increase exponentially if one combines disciplines, legal systems, and languages.

Some might include on the list of disadvantages the risk of being regarded by one's peers with indifference or a certain amount of suspicion. Consider the pioneers of the new science of complexity, formerly known as "chaos science." They are mathematicians, physicists, and biologists who suffered considerable professional disadvantages in their respective disciplines.<sup>1</sup> Because they strayed across the margins of several fields, they were regarded as neither fish nor fowl. They were treated as outsiders for many years by physics, math, and life science departments.

---

\* Learned Hand Professor of Law, Harvard Law School. Professor Glendon delivered this address at the *Writing Across the Margins* symposium held at Washington and Lee University School of Law on November 3, 1995.

1. See JAMES GLEICK, *CHAOS: MAKING A NEW SCIENCE* 37-38, 66 (1987).

Fortunately, the field of law has been relatively hospitable to cross-disciplinary work, in part because law students arrive with such varied educational backgrounds and because so many lawyers have to be generalists. Lawyers have learned that what begins as trespass can become possession if the poacher settles down and cultivates the area. And, as property students know, the right sort of possession kept up for a sufficient length of time may even end in ownership. The law and economics movement, which was just getting started when I was a student at the University of Chicago, affords a striking example of how scholars who began by writing across the margins can ultimately rewrite the page and relocate the margins.

Some interdisciplinary projects, however, remain outside the legal mainstream. In the United States, for example, that has been the fate of comparative law. American comparatists, in fact, often find that our colleagues abroad welcome our enterprise more than our colleagues at home. To many American lawyers, an interest in other legal systems is something like an interest in wines: a little knowledge about them is a sign of good taste and sophistication, but a serious dedication may be evidence of waste, or luxury, or even worse.

Sometimes it is just old-fashioned chauvinism that causes American lawyers to resist cross-national comparison. But more often their skeptical attitudes reflect the same doubts that comparatists themselves entertain. As the domestic legal environment becomes ever more complex and specialized, it is hard enough to keep abreast of even one corner of our own legal system. The more areas, systems, and approaches one tries to cover, the more one becomes vulnerable to Judge Harry Edward's charge of producing work that is neither useful to the legal community nor a significant contribution to other fields of human knowledge.<sup>2</sup> It is difficult to deny that Judge Edwards has a point when he complains that: "Our law reviews are now full of mediocre interdisciplinary articles. Too many law professors are ivory tower dilettantes, pursuing whatever subject piques their interest, whether or not the subject merits scholarship and whether or not *they* have the scholarly skills to master it."<sup>3</sup>

With comparative law, the difficulties escalate. We not only must become familiar with the technical aspects of another legal system, but we also have to assess how the law on the books actually operates in its own social context. In other words, we must become comparative social

---

2. See generally Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

3. *Id.* at 36.

scientists in the broadest sense. And often, we must learn another language.

The harder we try to avoid the pitfalls identified by Judge Edwards, the more likely we are to become mired in an even more intractable problem: the field of human knowledge is vast and life, alas, is short. On one side of our path, then, is the swamp of superficiality; on the other, the lime-pit of limitless learning. The path itself is slippery, and we can never see more than a few paces ahead.

Why, then, would anyone undertake comparative legal studies? For most of the American comparatists of the previous generation, the answer was easy: they had no choice. Nearly all of them were European-born lawyers forced to emigrate and start over from scratch in the 1930s.<sup>4</sup> Some, like my teacher Max Rheinstein, were already comparatists. The majority, however, had comparison thrust upon them.

For most of the current generation, I venture to guess that the first steps were not taken pursuant to any plan, but rather involved some casual trespass that led to an "aha" experience — an experience so pleasurable that we felt impelled to try to repeat it. A good example is David Currie, who taught and wrote about American environmental and constitutional law at the University of Chicago for many years before his dean, Gerhard Casper, encouraged him to take a research leave in Freiburg. Currie was attracted to the idea because he had always enjoyed studying languages.

I suppose he must have embarked on the experience as something of a lark, a vacation from his magisterial history of the Constitution in the United States Supreme Court.<sup>5</sup> In Freiburg, he began looking into how Germany was dealing with problems of pollution, and he made, as he put it to me in a recent conversation, "a series of minor discoveries." They seem to have affected him like eating peanuts. He turned to German constitutional law, where he came upon the notion of "positive rights" — the idea that the state must not only refrain from infringing certain rights, but must affirmatively promote them, even to the point of setting conditions for their effective exercise.<sup>6</sup> He describes his encounter with that concept as "eye-opening" because it enabled him to notice aspects of American constitutional law that he had never considered before.

4. See DER EINFLUSS DEUTSCHER EMIGRANTEN AUF DIE RECHTSENTWICKLUNG IN DEN USA UND IN DEUTSCHLAND 1-31 (Marcus Lutter et al. eds., 1993).

5. See generally DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS (1985); DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY (1990).

6. See generally David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986).

Out of Currie's margin-crossing came several important writings, including an essay on positive and negative rights in American law<sup>7</sup> and a treatise in English on German constitutional law.<sup>8</sup> He has gone on to learn Italian and is currently planning a book on Italian constitutional law.

What gets a scholar hooked on comparative legal studies, I believe, are not the usual pragmatic justifications that can be given for cross-national research.<sup>9</sup> Whatever prompts one's original step across the margins, what grips and holds people is one of the most powerful drives known to the human species: the unrestricted desire to know. If hauled up before Judge Edwards and charged with trespassing, the only honest defense most comparatists could offer would be, "I couldn't help it."

I would like, therefore, to focus on the question whether there is some reason why trespass should be especially productive of fertile insights such as those that abound in the fine book on rhetoric in constitutional law that we have gathered here to celebrate. That question falls somewhere within psychology, philosophy, and history, but has received relatively little attention from any of those disciplines. By insight, I mean the "aha" experience — the major and minor flashes of understanding that seemingly pop into one's mind out of nowhere. The classic instance is the tale of Archimedes, who became discouraged while trying to devise a method for measuring the proportion of gold in a crown. He betook himself to the public baths, where, as legend has it, he was idly noting the displacement of water by his body, when he had an idea so powerful that he ran naked into the street shouting a "Eureka!" that has echoed through the centuries.<sup>10</sup>

Modern firsthand accounts of path-breaking discoveries suggest that there may well be a connection between important insights like Archimedes's and the crossing of boundaries. A common thread in these stories is a complete inability (on the part of some of the most brilliant people who have ever lived) to explain just how they initially reached the breakthrough in question. It is significant that they characteristically insist the insight was not achieved through long study, although long study does

---

7. *Id.*

8. *See generally* DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* (1994).

9. *See generally* MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS* 8-11 (2d ed. 1994) (describing typical pragmatic justifications given for cross-national research).

10. *See* BERNARD J.F. LONERGAN, *INSIGHT: A STUDY OF HUMAN UNDERSTANDING* 3-6 (1958) (introducing his masterful study of how we know what we know with story of Archimedes).

seem to be a prerequisite. As Louis Pasteur put it, "Fortune favors the prepared mind."<sup>11</sup>

A typical account is that given by the mathematician Karl Friedrich Gauss to a friend of how he finally found the solution to a problem with which he had been struggling for four years. "At last," wrote Gauss, "I succeeded, not by dint of painful effort but so to speak by the grace of God. As a sudden flash of light, the enigma was solved . . . . For my part I am unable to name the nature of the thread which connected what I previously knew with that which made my success possible."<sup>12</sup>

It is noteworthy that Gauss and others have stressed that their breakthroughs did not emerge from logical and systematic processes of induction or deduction. In fact, it was only some time later that Gauss logically worked out the proof to validate his discovery. The sequence of proof following discovery is easy to overlook because when we read about the solution of a mathematical or scientific problem in a textbook, the order is always reversed: we are shown the proof as though it had led to the solution.

Students of cognitive theory (philosophers and psychologists writing across the margins of their disciplines) situate such episodes within the dynamic structure of human knowing: the cumulative processes through which all of us attend to the world around us, reflect on our experiences, get ideas about them, and use reason to sort the good ideas from the duds.<sup>13</sup> That recurrent process of experiencing, understanding, and evaluating regularly generates insights — not only great ideas on rare occasions in the minds of geniuses, but also little bright ideas in the minds of all of us every day.

In the recurrent mental operations that we collectively refer to as "knowing," the insight part is the most mysterious. If it is not the crowning step in a chain of logical reasoning and if it requires preparation — but preparation alone cannot make it happen — where does it come from? What makes insight more or less likely? What triggers insights of high quality, the kind that stand up to logical scrutiny and open new vistas?

Some who have speculated about these questions suggest that there are *conditions* that affect the frequency and quality of creative mental activity in individuals and in groups. The science historian Thomas Kuhn

11. *Quoted in* ARTHUR KOESTLER, *THE ACT OF CREATION: A STUDY OF THE CONSCIOUS AND UNCONSCIOUS PROCESSES OF HUMOR, SCIENTIFIC DISCOVERY, AND ART* 113 (1964).

12. *Quoted in id.* at 117.

13. *See generally* LONERGAN, *supra* note 10.

contends that significant advances in the natural sciences have generally been made by people who combine two qualities that do not always sit easily with one another: mastery of the normal science of their times, plus the boldness to break with the intellectual framework within which that normal science takes place.<sup>14</sup> A classic example is Charles Darwin, who was fully immersed in the biological science of his day before he got the ideas that utterly transformed it.

Arthur Koestler's studies of artistic and scientific creativity point to another condition that seems closely associated with the kinds of insights that change the way we understand the world. Koestler noticed that transformative breakthroughs have often been sparked by what he called "bisociation."<sup>15</sup> Bisociation was his name for what happens when two or more well-developed but relatively autonomous matrices of thought and experience come into contact.<sup>16</sup> Such encounters across disciplinary or cultural boundaries, according to Koestler, seem to trigger a fertile process of uncovering, selecting, reshuffling, combining, and synthesizing data, ideas, and skills.<sup>17</sup>

What do those descriptions of great moments of intellectual history have to do with our homely discipline of law? They are like a photographic enlargement of the same mental operations that take place in the minds of all of us from infancy onward. The insights of a lawyer or a toddler may be less momentous than those of a Gauss, but the process is the same.

A few years ago I came across a passage in an essay by a French historian that comes as close as anything I have seen to specifying the kind of "aha" that legal comparatists regularly experience. Fernand Braudel put it this way: "Live in England for a year and you will not learn much about the English. But when you return to France you will see, in the light of your surprise, that which had remained hidden to you because it was so familiar."<sup>18</sup>

That is precisely what happened to David Currie when he went to Freiburg. And that is what kept great comparatists like Max Rheinstein and John P. Dawson enthusiastic and productive right up to the end of

---

14. See THOMAS S. KUHN, *THE ESSENTIAL TENSION: SELECTED STUDIES IN SCIENTIFIC TRADITION AND CHANGE* 225-39 (1977).

15. See generally KOESTLER, *supra* note 11.

16. *Id.*

17. *Id.* at 108-09, 120; see also GLEICK, *supra* note 1, at 37.

18. FERNAND BRAUDEL, *HISTOIRE ET SCIENCES SOCIALES: LA LONGUE DURÉE, ANNALES: ECONOMIES, SOCIÉTÉS, CIVILISATIONS* 725, 737 (1958).



their lives. There is something compelling about the experience of seeing something about our own legal system "in the light of [our] surprise," something that would probably have remained invisible to us without the perspective from another country, or culture, or from other disciplines such as literature, history, and economics. Then, as we reason about and critically evaluate what we have seen, we are off to the races: the recurrent steps in the dynamic, cumulative processes of human knowing. Those processes of experiencing, understanding, reasoning, and judging, in turn, lead to cognitive restructuring, higher viewpoints, and fresh insights. And so it goes.

Like Currie, I stumbled into comparative law through language: Max Rheinstein recruited me for the University of Chicago's Foreign Law Program because of my schoolbook French. When I became a law professor, it seemed natural to me, when dealing with the problems our legal system does not handle very well, to look around to see how those problems were dealt with in the legal systems of other liberal democracies. I began to realize, through comparative constitutional studies, that the post-World War II language of human rights, like other languages, is spoken in different dialects. That realization led to the recognition that our American form of rights talk is quite distinctive.<sup>19</sup> It differs in significant respects from the discourse embodied in the United Nations Universal Declaration of Human Rights and in many continental European legal systems. That realization, in turn, led me into problems of cultural and legal hermeneutics that other panelists here have approached from different interdisciplinary routes. More recently, it has drawn me into the study of the migration of legal ideas, of legal syncretism, and of the way in which differing rights ideas can merge with, colonize, displace, or be displaced by one another.

To return now to the question I posed at the outset: Can one say any more about the conditions that promote fertile ideas? This is not just a matter of interest to scholars. When longtime practicing lawyers are asked what qualities they value in an associate, they often say that the pearl beyond price is the associate who, in addition to possessing all the usual legal skills, is regularly able to come up with problem-solving ideas.

But good ideas cannot be produced on demand. Nor can we do much to upgrade the mental equipment we received at birth. We can, however, cultivate the "prepared mind" of which Pasteur spoke;<sup>20</sup> we can be atten-

---

19. See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 12 (1991).

20. See KOESTLER, *supra* note 11.

tive to experience and we can develop our reasoning skills. Beyond that, cognitive theory suggests that confrontation or comparison of different spheres of meaning increases the probability of insights and opens up previously unrecognized avenues of inquiry.<sup>21</sup> Legal sociologist Gunther Teubner refers to such encounters as "shocks" that promote transformative restructuring by shaking up the categories within which we habitually work.<sup>22</sup> But "triggers" and "shocks" are metaphors, not explanations. Perhaps the most one can say is that "bisociation" seems to work even though we do not know why or how.

Let me now return to two points I mentioned earlier: the fact that most bright ideas are duds and the fact that most paradigm-transforming achievements have not been produced by rebels who scorned the work of their predecessors, but by innovators who respected and mastered a tradition. Think here not only of Darwin, but Picasso, Stravinsky, or T.S. Eliot. For those of us who labor at less exalted levels, does that not condemn us to the slippery slope of superficiality or the hopelessly long march toward the book we will never be quite ready to write?

In facing that dilemma, legal scholars might do well to ponder Thomas Kuhn's observation that, more often than not, it is the community of specialized knowers, rather than any single individual, that possesses the requisite combination of a rigorous grounding in tradition with an innovative spirit.<sup>23</sup> When both qualities are well-represented in the professional mix and when both traditionalists and innovators are well-grounded in normal science, you have what Kuhn calls the "essential tension" that promotes creativity.<sup>24</sup> The tension benefits the entire group by pulling all of its members in both directions.<sup>25</sup> The stage is then set for collective achievements like quantum theory, or the American Founding, or at a more modest level, law and economics.

Kuhn's observations are especially pertinent to a field like comparative law. European comparative law institutes have tackled the problem of amassing the requisite languages and technical legal knowledge by fostering scholarly collaboration. Thirty years of collaborative effort on the *International Encyclopedia of Comparative Law* under the direction of Ulrich Drobnig at Hamburg's Max Planck Institute for Foreign and

---

21. See LONERGAN, *supra* note 10, at 626 (discussing shock effect of humor).

22. See Gunther Teubner, *The Two Faces of Janus: Rethinking Legal Pluralism*, 13 CARDOZO L. REV. 1443, 1453-56 (1992).

23. See KUHN, *supra* note 14, at 227-28.

24. *Id.* at 225.

25. *Id.* at 234.

International Law provide eloquent testimony both to the difficulties and rewards of teamwork.

In light of Thomas Kuhn's research, however, I cannot help wondering about the implications for our own legal system when so many American legal scholars currently are disdainful of our own equivalent of normal science, namely, the study and practice of law. The American legal academy seems to be well-supplied with iconoclasts, but these daring individuals often have a shallow understanding of their own legal traditions and of the nuts and bolts of the legal system. A related concern is that so many legal scholars work in relative isolation and, as a result, lose the benefits that can attend more self-consciously collaborative enterprises.

On the other hand, one need not find one's intellectual companions in one's own discipline, or one's own nation-state, or even in one's own time. In fact, the most moving account of reaching across margins that I have ever seen is about friendship with the dead. I would like to close, therefore, with a few lines from a letter by a thinker who initiated a great transformation in political philosophy. He had just been released from prison and was keeping, as we would say, a low profile, working outdoors on his estate, with few opportunities for intelligent conversation. In the evenings, however, he writes:

I return to my house and go into my study. At the door I take off my clothes of the day, covered with mud and mire, and I put on my regal and courtly garments; and decently reclothed, I enter the ancient courts of ancient men, where, received by them lovingly, I feed on the food that alone is mine and that I was born for. There I am not ashamed to speak with them and to ask them the reasons for their actions; and they in their humanity reply to me. And for the space of four hours I feel no boredom, I forget every pain, I do not fear poverty, death does not frighten me. I deliver myself entirely to them.<sup>26</sup>

The letter is dated December 10, 1513. The writer was that tradition-haunted paradigm-breaker, Niccolò Machiavelli.

It is worth recalling that Machiavelli would not have located himself within the then-unknown discipline of political science any more than Adam Smith would have called himself an economist. The freedom they enjoyed to roam from one field to another has been lost to us with the increasing fragmentation and specialization of the human sciences. From that perspective, we can view writing across margins as an act of faith in the unity of knowledge. In that sense, we who cross borders are not

---

26. Letter from Niccolò Machiavelli to Francesco Vettori (Dec. 10, 1513), in NICCOLÒ MACHIAVELLI, *THE PRINCE* app. at 107-08 (Harvey C. Mansfield trans., 1985).

trespassers at all. We are more like voyagers drawn by the eros of the mind toward the destination for which we were born. Even if, like Moses, we cannot enter that promised land, we can approach it, and perhaps glimpse it from afar.<sup>27</sup>

---

27. *Deuteronomy* 34:4-5.